

Work Health and Safety Amendment Regulation 2022 (No 3)

Subordinate law SL2022–15

made under the

Work Health and Safety Act 2011, section 276 (Regulation-making powers)

EXPLANATORY STATEMENT

OVERVIEW OF THE REGULATION

The Work Health and Safety Amendment Regulation 2022 (No 3) (Amendment Regulation) makes a number of amendments to the *Work Health and Safety Regulation 2011* (WHS Regulation) in relation to chapter 7A (Crystalline Silica).

Respirable Crystalline Silica

Crystalline silica is a natural mineral found in construction materials such as concrete, bricks, mortar, and engineered stone. Dust containing respirable crystalline silica (silica) particles is commonly called silica dust. Activities such as cutting, grinding, sanding, or drilling products that contain silica can generate respirable silica dust particles that may not be visible and are small enough to breathe into the lungs. The dust may be harmful when inhaled into the lungs over a long period of time at low to moderate levels, or short periods at high levels.

Strengthening work safety laws to better protect workers from silica dust exposure is a national and local priority. In the ACT, Silica dust reforms are part of the legislative reform agenda outlined in the Parliamentary Agreement for the 10th Legislative Assembly of the ACT.

Since 14 July 2022, the WHS Regulation was amended to provide a dedicated chapter for crystalline silica and introduced general obligations applying to silica containing materials and specific obligations applying to silica dust work.

Chapter 7A of the WHS Regulation as amended by this Amendment Regulation:

- prohibits the uncontrolled dry-cutting of crystalline silica materials; and
- mandates silica dust awareness training for certain occupations at higher risk of exposure to silica dust.

Relevantly, this Amendment Regulation introduces:

- a mechanism by which processes and products that are not suitable for wet controls can be managed using best practice dry controls, but only after a thorough and consultative risk assessment eliminates wet controls;
- a mechanism by which the regulator and authorised officials exercising right of entry powers can readily inspect the records of these assessments and initiate compliance action if required;
- mechanisms by which stronger controls can be inserted, such as when new dust suppression technologies and products come onto the market, without requiring amendment of the Regulation.

CONSULTATION ON THE PROPOSED APPROACH

Industry stakeholders, unions and WorkSafe ACT have been consulted in the development of this Amendment Regulation.

CONSISTENCY WITH HUMAN RIGHTS

All amendment regulations must be compatible with the *Human Rights Act 2004* (HRA). The compatibility of this Amendment Regulation with the HRA was considered during its development.

Section 28(1) of the HRA provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28(2) of the HRA contains a framework that is used to determine the acceptable limitations that may be placed on human rights.

The limitations in this Amendment Regulation on rights protected in the HRA are considered demonstrably justifiable pursuant to section 28 of the HRA.

An assessment of the Amendment Regulation against the rights protected by the HRA is provided below. It is relevant that this Amendment Regulation makes adjustments to existing sections to which strict liability has been applied, to modify the required controls relating to the use of a wet dust suppression method when managing the risk of exposure to silica dust from work or near work activities being undertaken involving the mechanical cutting of crystalline silica. To this extent the

assessment of human rights engaged as outlined in the Explanatory Statement for the *Work Health and Safety Amendment Regulation 2022 (No 1)* applies similarly to this Amendment Regulation as provided below.

Rights engaged

The Amendment Regulation engages and promotes the right to life under section 9 of the HRA.

The Amendment Regulation engages and promotes the right to work under section 27B of the HRA.

The Amendment Regulation also engages and may limit rights in criminal proceedings under section 22 of the HRA.

Rights Promoted

Respirable Crystalline Silica – Uncontrolled dry cutting ban

The Regulation engages and promotes the right to life (section 9) and the right to work (section 27B). The rights to life liberty and security impose duties on the ACT Government to protect life and take reasonable measures to prevent injury in workplaces, while the right to work guarantees just and favourable conditions of work, including safe and healthy working conditions.

Through the Amendment Regulation, the ACT Government is taking positive steps to satisfy its duty to protect life and prevent injury and ensure healthy working conditions by introducing an offence for the uncontrolled dry cutting of silica containing materials at workplaces.

The offence acts as a deterrent to poor work safety practices and encourages PCBUs to dedicate resources and attention to workplace safety.

Rights Limited – Rights in criminal proceedings – strict liability and the presumption of innocence

1. Nature of the right and the limitation (s28(a) and (c))

Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The clarifying components of the Amendment Regulation are taking positive steps to protect the health and safety of workers and prevent workplace injuries. The Regulation potentially engages and limits the right to the presumption of innocence through the application of strict liability provisions as per section 12A of the *Work Health and Safety Act 2011* which apply to elements of the offence provisions in Chapter 7A (Crystalline silica) of the WHS Regulation, specifically clauses 10 and 11 of the Amendment Regulation.

Strict liability provisions generally engage and limit the right to be presumed innocent as they remove the need for prosecution to prove an accused person's fault (i.e. the mental element of intent or recklessness) in relation to an offence generally or for

particular elements of an offence. As a result, this reverses the onus in criminal proceedings and requires an accused to prove a defence for those elements to which strict liability applies, such as a mistake of fact under the *Criminal Code 2002*.

2. Legitimate purpose (s28(b))

The legitimate purpose of the strict liability provision is to support enforcement of the measures in the regulation to restrict/prohibit dry cutting of silica containing materials, which aims to protect the health and safety of workers. The penalty that may be imposed on commission of the offence will act as a deterrent against PCBU's providing unsafe workplaces. The *Work Health and Safety Act 2011* (WHS Act) imposes health and safety duties on all PCBU's in the Territory, as well as duties to their officers and workers. All PCBU's are required to be aware of their health and safety duties under the WHS Act and it is reasonable for the law to assume this is the case in the context of a workplace exposure to silica containing materials.

3. Rational connection between the limitation and the purpose (s28(d))

The offence elements applying strict liability have been considered during the development of the Amendment Regulation. The strict liability offences arise in a regulatory context where, for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties. The rationale for its use in the Regulation is that people who owe work safety duties such as PCBU's, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public. In particular, where an accused can reasonably be expected, because of his or her professional involvement, to know the requirements of the law, the mental (or fault) element can justifiably be excluded. Accordingly, strict liability offences are applied so that every relevant person complies with their obligations at all times and acts appropriately to secure the health and safety of workers and others at the workplace.

4. Proportionality (s28 (e))

Given the serious health implications exposure to silica containing materials may have on workers, the application of strict liability is necessary and proportionate to ensure a culture of safe work practices. It is not considered that there are any less restrictive means reasonably available to achieve the purpose of addressing the risks that arise from uncontrolled dry cutting of silica containing materials, and encouraging proactive work health and safety compliance is far more difficult to achieve without the use of strict liability offences. Strict liability clearly identifies the essential elements that form part of the regulatory framework that encourage PCBU's to maintain a workplace that is free from harm or injury.

The application of strict liability is reasonable to protect the health and safety of workers. Strict liability is only applied to particular elements of the uncontrolled dry cutting of silica containing materials offence under Section 418B of the Regulation. This Amendment Regulation clarifies that a PCBU must not direct or allow a worker

to cut material containing crystalline silica with a power tool or use another mechanical process to cut the material unless a combination of control measures are in place. It ensures those who hold responsibility for a health or safety duty uphold that responsibility and cannot escape liability by claiming ignorance of the duty or ignorance of the effect of their conduct. The defence of mistake of fact as provided by the *Criminal Code 2002* remains available to any accused for any strict liability provisions. The requirement to which the offence applies is not burdensome or out of alignment with the WHS framework and relates to ensuring the safety of workers as well as the broader ACT community.

The application of strict liability to uncontrolled dry cutting and to PCBUs who do not take all reasonably practicable measures to address exposure risks associated with silica containing materials, complements the existing scheme regulating WHS and is supported by increasing evidence of the substantial risk of inhalation of silica dust.

The application of strict liability and the penalties imposed are in line with those applied to asbestos duties under the WHS Regulation. The penalty amount applied is also consistent with penalties applied for breach of duty relating to asbestos under chapter 8 of the WHS regulation. The strict liability offence applied in the silica chapter of the regulation acts as an incentive for duty holders and officers to observe their duties under the Regulation.

The Regulation places the least restrictive limitation on the right to presumption of innocence, as it does not apply strict liability to information that is known by an accused, and that may be revealed to prove or disprove the defence.

CLAUSE NOTES

Work Health and Safety Amendment Regulation 2022 (No 3)

Clause 1 Name of regulation

Clause 1 provides for the name of regulation as the Work Health and Safety Amendment Regulation 2022 (No 3).

Clause 2 Commencement

Clause 2 provides for the commencement of the Amendment Regulation.

Specifically, the Amendment Regulation (other than sections 4 and 5, and schedule 1) is to commence on the day after notification day.

Sections 4 and 5 will commence on 31 January 2023.

Schedule 1 is to commence immediately after the commencement of the *Work Health and Safety Amendment Regulation 2022 (No 2)*.

Clause 3 Legislation amended

Clause 3 sets out the regulation amended by the Amendment Regulation.

Clause 4 Section 291 (1), definition of *high risk construction work*, new paragraph (s)

This clause inserts a new subsection that will expressly make work involving the cutting of crystalline silica material using a power tool or another mechanical process high risk construction work. This means that where this work is performed, a person conducting a business or undertaking must ensure that a safe work method statement under division 6.3.2 of the WHS Regulation is prepared and covers the activity.

Clause 5 Section 291 (2), new definitions

This clause is consequential upon clause 4 and inserts the definition of *crystalline silica material, cut* and *mechanical process* as defined in section 418A (1) of the WHS Regulation.

Clause 6 Section 418A (1), definition of *additional crystalline silica control measure*

This clause omits the definition of additional crystalline silica control measure consequential on inserting this definition under clause 7 of the Amending Regulation.

Clause 7 Section 418A (1), new definitions

This clause inserts in the dictionary the definition of *class H vacuum*, *class M vacuum*, *crystalline silica control measure*, *crystalline silica material*, *cut* and *mechanical process*.

Clause 8 Section 418A (1), definition of *material containing crystalline silica*

This clause omits the definition of material containing crystalline silica consequential on clause 7 defining this now as *crystalline silica material*.

Clause 9 Section 418A (1), definition of *wet dust suppression method*, paragraph (a)

This clause is a technical amendment to omit the words ‘airborne contaminants’ and replace with ‘airborne crystalline silica’ for consistency within chapter 7A.

Clause 10 Section 418A (1), definition of *wet dust suppression method*, paragraph (b)

This clause is a technical amendment to omit the words ‘airborne contaminants’ and replace with ‘airborne crystalline silica’ for consistency within chapter 7A.

Clause 11 Section 418B

This clause substitutes section 418B with new sections 418B and 418BAA to prohibit the uncontrolled dry cutting of engineered stone and other crystalline silica materials (excluding engineered stone) respectively.

It will be an offence under these sections where a person conducting a business or undertaking directs workers to cut:

- engineered stone with a power tool or another mechanical process without having control measures in place of a continuous feed of water over the cutting area and at least one other crystalline silica control measure; or
- crystalline silica materials other than engineered stone, with a power tool or another mechanical process without having at least one crystalline silica control measure in place.

Clause 12 Section 418C

This clause substitutes section 418C with new section 418C and 418CAA to specify the controls measures required to effectively manage the risks of exposure to silica dust when cutting engineered stone and other crystalline silica material (excluding engineered stone) respectively.

Where the risks of exposure to silica dust are not able to be eliminated, under section 418C a person conducting a business or undertaking must ensure that effective controls are in place to minimise the risks of exposure to silica dust when

cutting engineered stone with a power tool or using a mechanical process that includes:

- a continuous feed of water over the cutting area;
- at least one other crystalline silica control measure; and
- suitable respiratory protective equipment.

Where the risks of exposure to silica dust are not able to be eliminated, under section 418CAA a person conducting a business or undertaking must ensure that effective controls are in place to minimise the risks of exposure to silica dust when cutting crystalline silica materials, other than engineered stone, with a power tool or using a mechanical process that includes:

- a continuous feed of water over the cutting area and at least one other crystalline silica control measure;
- if that is not reasonably practicable, a wet dust suppression method and at least one other crystalline silica control measure;
- if that is not reasonably practicable, an approved vacuum attached to the tool and at least one other crystalline silica control measure;
- if that is not reasonably practicable, a wet dust suppression method or an approved vacuum attached to the tool or a fully enclosed operator cabin fitted with a high efficiency air filtration system;
- if that is not reasonably practicable, at least one crystalline silica control measure and suitable respiratory protective equipment.

Clause 13 Dictionary, definition of *additional crystalline silica control measure*

This clause omits the definition of additional crystalline silica control measure consequential on clause 7 defining this now as a *crystalline silica control measure*.

Clause 14 Dictionary, new definitions

This clause assists the reader by adding new definitions used in chapter 7A into the dictionary for the WHS Regulation.

Clause 15 Dictionary, definition of *material containing crystalline silica*

This clause omits the definition of material containing crystalline silica consequential on clause 7 defining this now as *crystalline silica material*.

Schedule 1 Other amendments

Schedule 1 is consequential on and replicates the changes made to chapter 7A in this Amendment Regulation. This clause is required due to the commencement of schedule 1 of the *Work Health and Safety Amendment Regulation 2022 (No 1)* on 1 July 2023.